

The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.

Paper No. 21

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte HARRY BUSSEY JR. et al.

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Appeal No. 2001-1622  
Application No. 09/226,969

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ON BRIEF

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Before STAAB, NASE, and BAHR, Administrative Patent Judges.  
NASE, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 12 to 14 and 17. Claims 1, 2, 5 to 8, 10, 11, 15 and 16, the only other claims pending in this application, have been withdrawn from consideration under 37 CFR § 1.142(b) as being drawn to a nonelected invention.<sup>1</sup>

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<sup>1</sup> Claims 12 and 15 were amended subsequent to the final rejection.

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We REVERSE.

BACKGROUND

The appellants' invention relates to a pool cover. A copy of the claims under appeal is set forth in the appendix to the appellants' brief.

The prior art reference of record relied upon by the examiner in rejecting the appealed claims is:

Wilson	4,426,995	Jan. 24,
1984		

Claims 12 to 14 and 17 stand rejected under 35 U.S.C. § 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the appellants, at the time the application was filed, had possession of the claimed invention.

Claim 14 stands rejected under 35 U.S.C. § 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to enable one

skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

Claims 12 and 13 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Wilson.

Claims 12 and 14 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Wilson.

Claims 17 stands rejected under 35 U.S.C. § 103 as being unpatentable over Wilson.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellants regarding the above-noted rejections, we make reference to the answer (Paper No. 18, mailed December 1, 2000) for the examiner's complete reasoning in support of the rejections, and to the brief (Paper No. 17, filed October 18, 2000) and reply brief (Paper No. 19, filed February 5, 2001) for the appellants' arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellants' specification and claims, to the applied prior art reference, and to the respective positions articulated by the appellants and the examiner. As a consequence of our review, we make the determinations which follow.

**The written description rejection**

We will not sustain the rejection of claims 12 to 14 and 17 under 35 U.S.C. § 112, first paragraph.

The test for determining compliance with the written description requirement is whether the disclosure of the application as originally filed reasonably conveys to the artisan that the inventor had possession at that time of the later claimed subject matter, rather than the presence or absence of literal support in the specification for the claim language. See Vas-Cath, Inc. v. Mahurkar, 935 F.2d 1555, 1563-64, 19 USPQ2d 1111, 1116-17 (Fed. Cir. 1991) and In re Kaslow, 707 F.2d 1366, 1375, 217 USPQ 1089, 1096 (Fed. Cir. 1983).

The examiner determined (answer, pp. 4-6) that the claim 12 limitation that at least one of the layers has "a plurality of rows of discrete and spaced apart pockets" therein lacked support in the original disclosure. We do not agree. We agree with the appellants' argument (brief, pp. 5-6; reply brief, pp. 1-3) that the appellants' Figure 2 combined with the description at page 5, lines 8 et seq., provide the required written description support for the above-noted claim limitation. It is our view that the original disclosure that the pockets 16 shown in the cross-sectional view of Figure 2 are semi-spherical in shape and that the resulting multi-layered sheet can be cut into suitable widths or lengths to form the pool cover would be sufficient to reasonably convey to an artisan that the appellants had possession at the time the invention was filed of the later claimed subject matter (i.e., the above-noted limitation of claim 12). In that regard, Figure 2 clearly shows the appellants' layer 15 with a row of discrete and spaced apart semi-spherical pockets 16. Since the pockets are semi-spherical in shape it is clear to us that to form a pool cover there must be more than one row of discrete and spaced apart semi-spherical pockets 16, thus

providing support for the limitation of claim 12 that at least one of the layers has "a plurality of rows of discrete and spaced apart pockets" therein.

For the reasons set forth above, the decision of the examiner to reject claims 12 to 14 and 17 under 35 U.S.C. § 112, first paragraph, based on the written description requirement is reversed.

#### **The enablement rejection**

We will not sustain the rejection of claim 14 under 35 U.S.C. § 112, first paragraph.

An analysis of whether the claims under appeal are supported by an enabling disclosure requires a determination of whether that disclosure contained sufficient information regarding the subject matter of the appealed claims as to enable one skilled in the pertinent art to make and use the claimed invention. The test for enablement is whether one skilled in the art could make and use the claimed invention from the disclosure coupled with information known in the art

without undue experimentation. See United States v. Telectronics, Inc., 857 F.2d 778, 785, 8 USPQ2d 1217, 1223 (Fed. Cir. 1988), cert. denied, 109 S.Ct. 1954 (1989); In re Stephens, 529 F.2d 1343, 1345, 188 USPQ 659, 661 (CCPA 1976).

The examiner determined (answer, pp. 6-7) that the limitation in claim 14 of "whereby additional air pockets are formed between said pockets in said second layer and the body of water" violated the enablement requirement. We do not agree. We agree with the appellants' argument (brief, p. 7) that an artisan would understand the appellants' Figure 2 and description at page 5, lines 5-7, as teaching that the bottom surface of the opaque layer 15 is formed with pockets 17 which will trap air therein when the bottom surface of the opaque layer 15 is placed on the surface of the body of water in a pool. Thus, the disclosure contains sufficient information as to enable one skilled in the pertinent art to make and use the subject matter of claim 14 without undue experimentation.



For the reasons set forth above, the decision of the examiner to reject claim 14 under 35 U.S.C. § 112, first paragraph, based on the enablement requirement is reversed.

### **The anticipation rejections**

We will not sustain the rejection of claims 12 to 14 under 35 U.S.C. § 102(b).

To support a rejection of a claim under 35 U.S.C. § 102(b), it must be shown that each element of the claim is found, either expressly described or under principles of inherency, in a single prior art reference. See Kalman v. Kimberly-Clark Corp., 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed. Cir. 1983), cert. denied, 465 U.S. 1026 (1984).

Claim 12, the sole independent claim on appeal, recites a pool cover for covering a body of water in a pool comprising, inter alia, a first opaque lightweight flexible plastic layer and a second opaque lightweight flexible plastic layer secured to and under the first layer whereby said layers block

sunlight from entering the body of water to thereby inhibit growth of algae in the body of water.

The examiner determined (answer, pp. 7-8) that the claimed two opaque layers were readable on Wilson's layers 16 and 18. We do not agree. While Wilson's layer 16 is opaque (see column 3, line 1), we find no disclosure in Wilson that layer 18 is opaque.<sup>2</sup> While Wilson teaches (column 3, lines 56-58) that layer 18 has a thermal conductivity which is comparable to that of layer 16, this does not mean that layer 18 is opaque since layer 16 is opaque.

Since all the limitations of claims 12 to 14 are not found in Wilson for the reasons set forth above, the decision of the examiner to reject claims 12 to 14 under 35 U.S.C. § 102(b) is reversed.

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<sup>2</sup> In our view, the broadest reasonable interpretation consistent with the specification, of the term "opaque" is "impervious to the passage of light" as set forth in the first definition thereof in The American Heritage Dictionary, Second College Edition, (1982).

**The obviousness rejection**

We will not sustain the rejection of claim 17 under 35 U.S.C. § 103 since the examiner has not even alleged that it would have been obvious at the time the invention was made to a person of ordinary skill in the art to have made Wilson's layer 18 opaque as required to meet parent claim 12.

CONCLUSION

To summarize, the decision of the examiner to reject claims 12 to 14 and 17 under 35 U.S.C. § 112, first paragraph, based on the written description requirement is reversed; the decision of the examiner to reject claim 14 under 35 U.S.C. § 112, first paragraph, based on the enablement requirement is reversed; the decision of the examiner to reject claims 12 to 14 under

35 U.S.C. § 102(b) is reversed; and the decision of the  
examiner to reject claim 17 under 35 U.S.C. § 103 is reversed.

REVERSED

LAWRENCE J. STAAB	)	
Administrative Patent Judge	)	
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	)	BOARD OF PATENT
JEFFREY V. NASE	)	APPEALS
Administrative Patent Judge	)	AND
	)	INTERFERENCES
	)	
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JENNIFER D. BAHR	)	
Administrative Patent Judge	)	

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CARELLA, BYRNE, BAIN, GIFILLAN,  
CECCHI, STEWART & OLSTEIN  
SIX BECKER FARM ROAD  
ROSELAND, NJ 07068

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